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SUBJECT: THE 1997 CONSTITUTION - FINDING AND FIXING THE
LEAKS

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Classified By: Political Counselor Susan Sutton for Reason 1.4 (B,D)

[1](#)1. (C) SUMMARY. While much of the opposition rhetoric fueling the current political crisis focuses on vilifying Thaksin, the roots of the crisis lie in the Prime Minister's deft exploitation of certain key weaknesses inherent in the 1997 Constitution. POLOFF recently discussed these weaknesses and possible fixes in separate meetings with Constitutional law expert and Thammasat University law professor, Prinya Thewanarumitkun and Senate Advisor Dr. Montree Rupsuwan who headed a Senate Commission charged with suggesting Constitutional amendments in 2002. This cable will highlight specific elements of the 1997 Constitution that these experts view as flawed and potential amendments designed to address these defects. Once the current political standoff comes to an end, and the next Thai government convenes to discuss constitutional reform, these details will likely become the focal point of the debate. The trick will be for reformers to avoid a tactical approach aimed at simply preventing future Thaksin-style exploitation. END SUMMARY.

CHECKS AND BALANCES - Independent Institutions

[1](#)2. (C) The 1997 Constitution aimed at strengthening the role of the Prime Minister in order to end the cycle of weak, short-lived and ineffective governments that had plagued Thailand under civilian rule (see Reftel A). At the same time, the document called for the creation of a variety of independent institutions to serve as the checks and balances of this increased power. However, according to Prinya and Montree, the selection process set forth in the constitution for members of these institutions left the door open for political manipulation. In their view, the Constitutional Court, the Election Commission and the National Counter-Corruption Commission (NCCC) are particularly vulnerable to this weakness.

[1](#)3. (C) Article 257 sets forth the selection procedures for members of the Constitutional Court. It calls for the establishment a 13-person Selection Committee that nominates a short-list of candidates to the Senate for consideration. The Senate must then choose from this short list. To be nominated, a potential candidate must receive the support of three-fourths of the Selection Committee. The Selection Committee is composed of four members selected from Law Faculty Deans from State higher education institutions; four members selected from Political Science Faculty Deans from State education institutions; and four members from political parties who hold seats in Parliament. According to both Prinya and Montree, the problem lies in the fact that Thaksin has used Thai Rak Thai's (TRT) control of Parliament to control 3 of the 4 slots allocated to political parties while at the same time wielding influence over the university Deans who fall under the Ministry of Education. This has allowed TRT to form a decisive bloc in the Selection Committee thus enabling it to determine who is included on the short list which is presented to the Senate.

[1](#)4. (U) Article 297 requires that the procedures outlined in Article 257 be followed for selection of members of the NCCC. The only difference is in the numbers. The Selection Committee for the NCCC contains 17 members: five from the ranks of political parties with seats in Parliament; seven selected from among Rectors of State higher education institutions; the President of the Supreme Court, the President of the Supreme Administrative Court, and the President of the Constitutional Court. Again, both Prinya and Montree agree that Thaksin and TRT have managed to use their commanding majority in the Parliament together with their influence over the Rectors through the Ministry of Education to take control of this Selection Committee.

[1](#)5. (C) The selection of the five-member Election Commission (EC) is a two-tiered system set forth in Article 138. The first tier calls for a 10-person Selection Committee composed of four members of political parties, the President of the Constitutional Court, the President of the Supreme Administrative Court and four academics from State-run

institutions of higher education. This committee submits a short-list of five nominees to the Senate based on a vote of at least three-fourths of its members. The second tier calls for the Supreme Court of Justice to submit a short-list of five nominees to the Senate. The Senate then selects the five-member EC from these ten names. Again, TRT has used its dominance of Parliament to control 3 of the 4 slots allocated to political parties while using its influence over the Ministry of Education to control the 4 slots allocated to academics. This bloc is made potentially stronger with the addition of the President of the Constitutional Court (see para 3).

16. (C) The proposed remedy to these windows of opportunity for political manipulation is to amend Sections 257, 297 and 138 to weaken the role of political parties in the Selective Committees. Montree noted that in 2002, the Senate recommended that the political parties be allocated only two seats - one for the ruling party, and one for an opposition party. It also suggested diluting the ability of the academics to form a decisive bloc by increasing the total number of positions on the committees. The proposal would add an independent ombudsman, the Chairman of the Human Rights Commission, the Chairman of the State Audit Commission and the Chairman of the NCCC to the Selection Committee for the Election Commission. With regard to the Selection Committee for the Constitutional Court, the proposal would add these positions plus the Chairman of the Election Commission.

17. (C) Montree also highlighted a Senate proposal to weaken the role of the Electoral Commission in general. Currently, the Electoral Commission has the power to set election regulations, implement them and make determinations as to whether candidates should be disqualified or issued Red/Yellow cards for alleged cheating. The proposed amendment would create an Electoral Court as a branch of the Supreme Court of Justice. This court would assume responsibility for determining whether candidates should be disqualified or issued Red/Yellow cards for alleged cheating.

THE 90-DAY RULE -----

18. (U) Article 107 contains the much debated 90-day rule. Paragraph 4 of this section states that in order to be eligible as a candidate in an election one must be a member of a political party for no less than 90 days prior to applying for candidacy. At the same time, the Prime Minister has the authority to dissolve Parliament and call for a snap election in 60 days.

19. (C) These two elements combine to effectively hold Members of Parliament (MP) hostage to their parties. If an MP (or group of MPs) leaves one party to join another, the Prime Minister can call snap elections, and the renegade MPs would be unable to compete in the elections.

110. (C) There is debate both outside and within political parties as to how or whether this statute should be amended. Some argue for doing away with paragraph 4 all together. Others, even some who are currently disadvantaged by the rule, see its long-term utility in terms of maintaining cohesion. They argue that Article 107 should be left as is.

THE SENATE -----

11. (C) The drafters of the 1997 Constitution hoped to create a non-partisan Senate that could act as an independent watchdog over the "political" House of Representatives. They gave the Senate final control over the appointment process for many of the independent institutions and, in Article 303, the power to impeach Members of Parliament, the Prime Minister, and certain members of the judiciary. In an effort to keep the Senate non-partisan, Article 126 states that members or officers in political parties are banned from becoming candidates for Senators. The same article prohibits Senators from seeking re-election. The rationale for this article was to create a Senate comprised of individuals without political affiliations.

112. (C) In practice, keeping the Senate non-partisan has proven difficult. As early as 2002, Montree estimated that approximately 50 percent of the Senate actively supported either the government or the opposition (see RefTel B). It is widely believed that TRT makes regular payments to Senators in order to keep them on its side. Given the powers vested in it, it is inevitable that political fights will be played out in the Senate. Amending Article 126 to allow candidates for the Senate to belong to political parties is one suggested method of making the political nature of the Senate more overt.

NO-CONFIDENCE AND REMOVAL FROM OFFICE -----

13. (C) The 1997 Constitution raised the number of MPs needed to call for a general no-confidence debate on the Prime Minister. Article 185 says that two-fifths of the MPs are needed to call of such a debate. According to Professor Prinya, previous Thai Constitutions set that limit at one-fifth. This has become an issue recently given Thai Rak Thai's solid control over the Parliament. There are some in academia and in the opposition political parties who call for the threshold to be reduced back to one-fifth.

INTERNAL WORKINGS OF POLITICAL PARTIES

14. (C) Another issue highlighted by Professor Prinya is the lack of any mechanism to institute democratic principles in the internal workings of Thai political parties. Article 47 states, "The internal organization, management and regulations of a political party shall be consistent with fundamental principles of the democratic regime of government...". However, there is no constitutional mechanism put for to enforce this mandate.

15. (C) In practice, leaders of political parties wield inordinate control over their parties. Professor Prinya argues that the Constitution should provide a mechanism to devolve power within political parties to the members of the party. He suggest an amendment that would form Executive Boards elected by the members of the party. These boards would then be charged with approving candidates for elections, and would have a strong role in developing the party's platform.

AMENDING THE CONSTITUTION

16. (C) All of the potential fixes highlighted above are contingent on Article 313 which establishes the procedures for proposing amendments to the Constitution. Under Article 313, motions for amendments may only be proposed by the Council of Ministers or by Members of Parliament. This leaves no room for persons outside of the political establishment to propose changes to the Constitution. Professor Prinya believes that this section should be amended to allow for persons outside political establishment to propose amendments by collecting at least 50,000 signatures on a petition which would then be submitted to the Parliament. Dr. Montree agreed with this idea in theory, but expressed the opinion that the threshold for the number of signatures needed to petition for an amendment to the Constitution should be significantly higher than 50,000.

THE "NO HOMERS" AMENDMENT??

17. (C) COMMENT: Thaksin has taken full advantage of weaknesses in the 1997 Constitution to expand his political power and that of his party. His opponents argue that Thaksin and TRT have trampled on the spirit of the law by neutering most, if not all, of the checks and balances that the drafters put in place. Much of the discussion on Constitutional reform centers on the need to revive and strengthen this system of checks and balances. However, given recent events and the prevailing political atmosphere, there is a risk that the process will focus on drafting measures to protect the Constitution from future Thaksin-like exploitation. The end result could be a Constitution with so many specific fixes to address specific loopholes that the document becomes cumbersome and overly complicated. Clearly, the system of checks and balances has not worked as intended under Thaksin and needs to be strengthened. The challenge for reformers is to move beyond Thaksin the individual, and craft legislation that results in a viable system of checks and balances, not simply fortified defenses for independent institutions that remain vulnerable. End Comment.

BOYCE